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No. 84-600

ALEXANDER L. STEVAS,
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(3)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

KAREN A. COOPER,
Petitioner,

vs.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY TO OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

None of the arguments advanced by Respondent justify a denial of the Petition for Writ of Certiorari in this case. Both of the questions presented raise important issues of law as to which there exists a conflict between the circuits.

The Jurisdictional Issue

1.a. Despite Respondent's contention, this case does present the issue of whether the thirty-day period within which a suit must be filed under Section 717(c) of Title VII is jurisdictional. The Ninth Circuit below characterized the District Court's action as follows: "Cooper appeals from the dismissal of her Title VII complaint...The dismissal was based upon a lack of jurisdiction

because Cooper failed to file an action naming the proper defendant within the period provided by 42 U.S.C. section 2000e-16(c)." [Pet. App. A-1, emphasis added].

In affirming this jurisdictional decision, the Ninth Circuit stated: "In view of Cooper's conceded failure to file a complaint against the Postmaster General within the statutory period, her claim must be barred unless her attempt to substitute the Postmaster General as a defendant relates back to the date her original complaint was filed." [Pet. App. A-4]. These two statements make clear that the Ninth Circuit, like the District Court, treated the filing period as jurisdictional and ruled on that basis. The jurisdictional issue is squarely presented for review by this Court.

1.b and c. Respondent further argues that even if the filing period in section 2000e-16(c) is jurisdictional, this Court should not review the Ninth Circuit's decision because that decision is correct and does not conflict with this Court's prior decisions in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) or Baldwin County Welcome Center v. Brown, ___ U.S. ___, 104 S.Ct. 1723 (1984). Respondent bases this contention on the argument that, in cases against the federal government, principles of sovereign immunity prohibit application of equitable tolling principles to the limitations period contained in a statute waiving immunity unless Congress has otherwise provided. [Unprinted transcript of Respondent's Opposition, pp. 6-9]. Thus, Respondent argues, even if the filing period for

Title VII actions against private employers is subject to equitable tolling, the corresponding time period for section 717 actions is not. On this basis Respondent would distinguish Zipes, supra and Baldwin County Welcome Center, supra.

Respondent's argument contains a fatal flaw. In enacting section 717 of Title VII, Congress provided that federal employees complaining of employment discrimination should be afforded the same rights and procedural protections as are available to private sector employees. Martinez v. Orr, supra, 738 F.2d 1107, 1110; Parks v. Dunlop, 517 F.2d 785, 787 (5th Cir. 1975). Congress specifically provided that federal employee suits brought under section 717 should be governed by the same

principles as govern private employees' suits under section 706(f).

Section 717(c) of Title VII, 42 U.S.C. section 2000e-16(c) (1970 ed., Supp. IV), states that a federal employee "may file a civil action as provided in section 706". Section 717(d), 42 U.S.C. section 2000e-16(d) (1970 ed., Supp. IV), goes on to specify that "[t]he provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder." Given that the limitation period contained in section 706(f)(1) has been construed as being non-jurisdictional, Baldwin County Welcome Center v. Brown, ___ U.S. ___, 104 S.Ct. 1723, 1731, it follows from the above-cited statutory language that the limitation period provided by section 717(c) must be afforded the same interpretation. This construction of

section 717(c) is consistent with the express intent of Congress, that "aggrieved [federal] employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under Title VII". S. Rep. No. 92-415, 92nd Cong. 1st Sess., 424 (1971).

1.d. Respondent further contends that review of the Ninth Circuit's decision is not warranted because there really exists no conflict between the circuits on the jurisdictional issue. [Unprinted transcript of Respondent's Opposition, pp. 9-11]. This argument is specious. All three of the circuit court decisions which conflict with the Ninth Circuit's decision below involved suits against a federal defendant.

Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Milam v. United States

Postal Service, 674 F.2d 860 (11th Cir. 1982); Salz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982). Therefore, any attempt to distinguish this case on a federal versus non-federal basis is unsound.

Furthermore, in Stuckett v. United States Postal Service, No. 83-6839 (October 9, 1984), Justices White and Rehnquist specifically stated that Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982) and Salz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982) conflict with the position of the Seventh Circuit on the jurisdictional issue presented by this case. There is clearly a conflict between the circuits on the jurisdictional issue.

1.e. Finally, Respondent argues that this case is not proper for review

because the Petition for Writ of Certiorari suggested no grounds for equitable tolling of the filing period and because Petitioner did not question the jurisdictional nature of the filing period below. [Unprinted transcript of Respondent's Opposition, p. 11].

In the District Court below, Petitioner did offer facts which would support equitable tolling of the filing period limitation and did argue that that period should be extended in light of equitable considerations. The full record, when presented to this Court, will reflect Petitioner's efforts in this regard. Stuckett v. United States Postal Service, supra, can be distinguished on this basis.

The issue as to whether equitable tolling would in fact have been justified in this particular case was not

reached by either the trial court or the Ninth Circuit, and that issue is not before this Court. Should this Court ultimately hold that the thirty-day filing period is subject to equitable tolling, the case should be remanded to the trial court for application of that doctrine to the facts of the case. It would be premature, and immaterial to the questions presented, to set forth those facts here.

The Rule 15(c) Issue

Respondent's argument against Petitioner's request that the Court accept review of the second question presented is based primarily on the proposition that, for Rule 15(c) purposes, federal defendants should be treated differently than non-federal defendants, and that they have in fact been so treated by the circuit courts.

[Unprinted transcript of Respondent's Opposition, pp. 14 and 18-19]. However, no such difference in treatment has ever existed at the circuit court level.

Respondent has been unable to point to a single district or circuit court decision that actually draws the federal defendant/non-federal defendant distinction it proposes, and to Petitioner's knowledge, none exists. In fact, the only court which has considered such a distinction rejected it and applied the Second Circuit's holding in Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979) to a suit against the United States Postal Service. Murray v. United States Postal Service, 569 F. Supp. 794, 796-797 (N.D.N.Y. 1983).

In Stewart v. United States, 655 F.2d 741 (7th Cir. 1981), the Seventh

Circuit did not base its holding on any distinction between a federal versus a non-federal defendant. It simply applied the same restrictive interpretation of Rule 15(c) in a suit against the former as it had previously applied in a suit against the latter. Simmons v. Fenton, 480 F.2d 133 (7th Cir. 1969). In another Seventh Circuit decision cited by Respondent, Hughes v. United States, 701 F.2d 56 (7th Cir. 1982), the court contrasted its interpretation of Rule 15(c) with that of the Second Circuit in Ingram v. Kumar, *supra*. In so doing, the court made no mention of any federal/non-federal distinction between the two cases.

Similarly, the Ninth Circuit draws no such distinction for Rule 15(c) purposes. In Williams v. United States, 711 F.2d 893 (9th Cir. 1983), the Ninth

Circuit stated: "A party being brought in by amendment under F.R.C.P. 15(c) must have received notice of the institution of the suit 'within the period provided by law for commencing an action against him'". 711 F.2d at 898 (emphasis added). The Ninth Circuit has never indicated that it would treat federal and non-federal parties any differently in this regard.

Nor has the Fifth Circuit. In fact, in Carr v. Veterans' Administration, 522 F.2d 1355 (5th Cir. 1975), the court based its decision on the holding in Martz v. Miller Brothers Company, 244 F. Supp. 246, 254 (D. Del. 1965), a case involving a private defendant.

Respondent's implication that the Second Circuit draws such a distinction in view of that court's holding in Evans

v. United States Veteran's Administration Hospital, 391 F.2d 261, cert. denied, 393 U.S. 1040 (1968) ignores the plain language of the Second Circuit's subsequent decision in Ingram v. Kumar, *supra*. The Ingram court explained that the decision in Evans was based on that fact that service of process on the originally misnamed federal defendant was not effected within a reasonable period of time, not because the new federal defendant had not received notice within the statute of limitations period. 585 F.2d at 572, n. 12. The Second Circuit position is that in all cases, whether against a federal or non-federal defendant, the period within which the party to be brought in must receive notice of the action includes a reasonable time as allowed under the Federal Rules for service of process.

This conflicts with the view taken by the Ninth and Seventh Circuits, and is consistent with the view held by the Fifth Circuit and the Tenth Circuit.

Kirk v. Cronvich, 629 F.2d 404 (5th Cir.

1980); Hunt v. Broce Construction

Company, 674 F.2d 834, 836-837 (10th

Cir. 1982). Respondent's contention

that no conflict exists as to the Rule

15(c) issue as applied to cases involving

federal defendants is based on an

elaborate misstatement of existing

circuit court authority and should be

rejected. The Petition should be

granted as to both questions presented.

Conclusion

At the risk of dignifying Respondent's closing remarks, Petitioner is compelled to protest Respondent's inaccurate and improper references to portions of settlement discussions in this

case. References to these discussions constitute a flagrant violation of Federal Rules of Evidence Rule 408. More importantly, Respondent's remarks are a frail attempt to misdirect the Court's attention to factors and circumstances, inaccurately stated, which are beyond the purview of consideration in deciding whether to grant a petition for writ of certiorari.

Despite Respondent's unfounded assertion to the contrary, this case presents two related and controverted questions involving jurisdiction and federal civil procedure the import of which should not be minimized. What is at stake in this lawsuit and countless others like it is the protection of the right of federal employees to pursue their claims of employment discrimination under Title VII against the federal

government. What is at stake for Petitioner Karen A. Cooper is the vindication of her civil rights under the law, which is not an insignificant matter.

Nothing is more basic to the viability and success of any lawsuit than the naming of the proper defendant and the filing of a timely complaint. Clarification of the parameters of these legal issues will redound to the benefit of the courts, and to current and potential litigants, including the federal

government. For all the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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